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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1932.

JOHN FACTOR,

Petitioner,

vs.

H. C. W. LAUBENHEIMER, United States Marshal, and GODFREY HAGGARD, His Britannic Majesty's Consul General,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

A.

Summary statement of matters involved.

This is a petition for certiorari to review a reversal of a judgment on *habeas corpus*. It involves important questions of local and general law and particularly the proper construction and application of a decision of this Court as to extradition under the treaties between the United States of America and Great Britain. The analysis of such decision by Judge Carpenter in the District Court, and his subsequent order, were disapproved by Judges Alschuler and Sparks, constituting a majority of the judges of the United States Circuit Court of Appeals. Judge Evans of that court filed a written opinion in dissent.

The questions presented by this petition are:

First. Whether "receiving money knowing the same to have been fraudulently obtained," the offense charged in this extradition proceeding, is a crime under the laws in force in the State of Illinois. Among other considerations this question involves the effect of certain language of the opinion of this Court in *Kelly* v. *Griffin*, 241 U. S. 6. If this question be answered in the negative, this extradition proceeding fails regardless of which Treaty is in force. If it be answered in the affirmative, then the following additional questions are raised:

Second. Whether the Dawes-Simon Extradition Treaty of 1932, which expressly abrogated the previous treaties under which this proceeding was instituted, is now in force in the United States.

Third. If said 1932 Treaty is now in force in the United States, did it abate this extradition proceeding?

Fourth. If said 1932 Treaty is now in force in the United States and governs though does not abate this extradition proceeding, is the offense charged an extraditable offense under the 1932 Treaty?

The petitioner was held for extradition from Illinois to England by United States Commissioner Walker on a complaint charging him with receiving sums of money from a private corporation, "knowing the same to have been fraudulently obtained," by that corporation. (R. .....)

The application for extradition was made under Article X of the Extradition Treaty of August 9, 1842, and the Convention of July 12, 1889, between the United States and Great Britain.*

On *habeas corpus* the District Court for the Northern District of Illinois, Judge Carpenter presiding, discharged

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* For the convenience of the Court Article X of the Extradition Treaty of August 9, 1842 and the relevant provisions of the Convention of July 12, 1889 are printed as Appendices A and B hereto. All appendices are bound under separate cover.

petitioner on the ground that the offense charged, while enumerated in the Convention of 1889 between the United States and Great Britain as an extraditable crime and while constituting a crime under the English Law, did not answer the third requirement of the treaty, *i. e.*, it did not constitute a crime under the laws in force in the State of Illinois.

The Circuit Court of Appeals, Judge Evans dissenting, reversed the District Court without passing independently upon the question whether receiving money from a private corporation, "knowing the same to have been fraudulently obtained" by that corporation constituted a crime under the laws of the State of Illinois.

It is conceded that the offense charged was not a crime at common law.

Neither the District Court nor the Circuit Court of Appeals found any statute which made the alleged offense a crime in Illinois, or any Illinois decision holding that the alleged offense was a crime in Illinois.

The conflicting decisions by these four Federal Judges resulted from a diversity of opinion as to the construction and effect to be given the language of this court in the case of *Kelly* v. *Griffin*, 241 U. S. 6. Judge Carpenter of the District Court and Judge Evans of the Circuit Court of Appeals held that, construed in the light of the issues involved and the facts presented, the *Kelly* case did not hold that the offense here alleged (receiving money from a private corporation, knowing the same to have been fraudulently obtained) was a crime in Illinois. A majority of the Circuit Court of Appeals, however, considered that certain statements in the opinion of *Kelly* v. *Griffin*, 241 U. S. 6, constituted a direct holding that there was such a crime under the laws in force in Illinois and were therefore controlling upon the Circuit Court of Appeals in this case, regard-

less of whether such an offense did actually exist under the laws in force in Illinois. (R. .....)

Judge Carpenter and Judge Evans based their respective opinions upon the fact that the offense charged in the *Kelly* case was receiving *government money* from *government officials*, knowing that it had been obtained by fraud *from the government*, and upon the fact that the statutes relied upon by the demanding government in the *Kelly* case did not make criminal in Illinois the receiving of money from anyone other than a *government official* with knowledge that it had been fraudulently obtained *from the government*. The majority of the Circuit Court of Appeals entirely disregarded these facts and, without analyzing or attempting to analyze the issues or facts in the *Kelly* case, held that the bare language of the opinion in that case was binding in the present case and required a reversal of the decision of the District Court without considering on the merits whether such an offense does actually exist under the laws in force in Illinois.

After the Circuit Court of Appeals had denied a petition for rehearing in this cause, it came to the attention of petitioner that a new extradition treaty between the United States and Great Britain, expressly abrogating all former extradition treaties, had been entered into before the original decision of the Court of Appeals. This new Treaty, referred to as the Dawes-Simon Treaty, was signed in London in December, 1931, ratified by the United States Senate in February, 1932, approved by the President of the United States in March, 1932, ratified by Great Britain in July, 1932, ratifications exchanged on August 4, 1932, and the Treaty itself proclaimed by the President of the United States on August 9, 1932. (R. .....) An examination of the new Treaty disclosed that it did not include, as an extraditable offense, the crime enumerated in the Convention of 1889 for which petitioner is sought to be extradited.

The language of the 1889 Convention relating to the offense here charged was:

> "Receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained."

The provision of the 1932 Treaty involved is:

> "Receiving any money, valuable security, or other property, knowing the same to have been stolen or unlawfully obtained."

Upon learning of the existence of the 1932 Treaty, petitioner presented to the Circuit Court of Appeals a motion to set aside its opinion and orders and to dismiss the appeal on the ground that the adoption of the 1932 Treaty and the abrogation of all previous treaties rendered void the pending application against petitioner for extradition to Great Britain. This motion was denied January 26, 1933, on the ground that the new treaty embodied and "carried forward all of the provisions" of the prior treaties under which this extradition proceeding was instituted and therefor did not terminate this proceeding. (R. .....)

The Court refused to pass upon the question of whether or not the 1932 Treaty was in force, although the record disclosed every act that had been performed by either government in respect of said 1932 Treaty.*

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* In denying the motion to dismiss, the Circuit Court of Appeals stated (Rec.....):

> "This matter coming on to be heard upon the said motion and the answer thereto, and the exhibits and letters presented and filed on behalf of the respective parties, and the briefs of counsel; and the Court being fully advised in the premises doth find: That it does not definitely appear, from the evidence submitted, whether or not the Dawes-Simon Treaty of 1932 has become effective in Great Britain, and therefore whether it is effective in the United States; but assuming, though not deciding, that the Dawes-Simon Treaty of 1932 has heretofore become effective and is binding upon the parties thereto, the said Dawes-Simon Treaty of 1932 embodies and carried forward all of the provisions of the other named treaties whereunder the extradition proceedings herein were commenced and carried on, and which this Court held sufficient to warrant the order which was made by the United States Commissioner for the holding of appellee thereunder, and that this proceeding for extradition so begun was not vacated or terminated by reason of the adoption of the Dawes-Simon Treaty."

During the pendency of the appeal before the Circuit Court of Appeals and prior to the handing down of its decision, petitioner filed an earlier motion to dismiss the appeal (R. .....), alleging a recent discovery of the fact that the extradition proceeding was instituted and maintained and the appeal was being prosecuted for the purpose of forcing the collection of alleged private debts claimed by subjects of Great Britain. (See majority and minority opinion of Circuit Court of Appeals, Appendix C, also R. .....) The motion charged a misuse of the extradition treaty and an abuse of court process. Upon a demurrer *ore tenus* by the demanding government, the motion to dismiss was denied on the ground that it presented matters solely for consideration by the Department of State. In presenting this petition we have yielded to the ruling of the Circuit Court of Appeals in this regard.

B.

Reasons relied on for allowance of the writ.

1. The Circuit Court of Appeals erred in holding that *Kelly* v. *Griffin*, 241 U. S. 6, bound it to find that "receiving money knowing the same to have been fraudulently obtained" is a crime in Illinois, and in so finding, the Circuit Court of Appeals decided an important question of local law in conflict with the existing laws in force in Illinois.

2. The Circuit Court of Appeals erred in deciding, in a manner untenable, an important question of Illinois criminal law affecting international extradition, which has not been passed upon by this Court or by any Illinois court. In reaching this decision, the Circuit Court of Appeals has departed from the accepted and usual course of judicial proceedings by refusing to determine the issue before it and holding itself bound by the general language in the opinion of *Kelly* v. *Griffin*, 241 U. S. 6, which, considered with the issues and facts in that case, is inapplicable here, and its

action in that regard calls for the exercise by this Court of its power of supervision.

3. The Circuit Court of Appeals erred in holding that "receiving money knowing the same to have been fraudulently obtained" is an offense for which extradition may be had from the State of Illinois to Great Britain either under the Convention of 1889 or the Dawes-Simon Treaty of 1932 and thereby decided an important question of federal law which has not been, but should be, settled by this Court.

4. The Circuit Court of Appeals erred in refusing to decide whether the Dawes-Simon Treaty of 1932 is in force in the United States and thereby left uncertain an important question of federal law which has not been, but should be, settled by this Court.

5. The Circuit Court of Appeals erred in failing to decide an important question of general federal law, by refusing to decide the question whether the Dawes-Simon Treaty of 1932 is in force in the United States, and thereby so far departed from the usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

6. The Circuit Court of Appeals erred in not holding that the Dawes-Simon Treaty of 1932 is in force in the United States, that such Treaty abrogated Article X of the Treaty of 1842 and the Convention of 1889 and that the offense charged in this extradition proceeding is not an extraditable offense under that Treaty, and thereby failed to decide, or erroneously decided, important questions of federal law which have not been, but should be, settled by this Court.

7. The Circuit Court of Appeals erred in holding that the Dawes-Simon Treaty of 1932 included all of the provisions of Article X of the Treaty of 1842 and the Convention of 1889, including the offense for which petitioner's extradition is sought.

8. The Circuit Court of Appeals erred in reversing the judgment of the District Court.

Wherefore, this petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Seventh Circuit, commanding that court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and of the proceedings in this case numbered and entitled on its docket No. 4764, *Harry C. W. Laubenheimer, United States Marshal,* and *Godfrey Haggard, His Britannic Majesty's Consul General, Appellants,* v. *John Factor, Appellee,* and that the said judgment of the said Circuit Court of Appeals for the Seventh Circuit may be reviewed by this Honorable Court and that this petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

JOHN FACTOR,
Petitioner.

By NEWTON D. BAKER,
RUSH C. BUTLER,
S. O. LEVINSON,
G. GALE GILBERT, JR.,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of courts below.

The majority and minority opinions of the Circuit Court of Appeals for the Seventh Circuit (61 Fed.(2d) 626) appear in full in the record, pages ....., ... The opinion of the District Court appears on pages ..... of the record herein. For the convenience of this Court all three of these opinions are reprinted as Appendices C and D to this brief (bound under separate cover).

II.

Jurisdiction.

1. The statutory provisions which sustain the jurisdiction of this court are section 240(*a*) of the Judicial Code, as amended by the Act of February 13, 1925 (section 347, Title 28, U. S. C. A.), and c. 229 § 6 of the Act of February 13, 1925 (section 463(*c*), Title 28, U. S. C. A.).

2. The judgment of the Circuit Court of Appeals sought to be reviewed became final upon the denial of the petition for rehearing on November 15, 1932. (R. .....) It was first entered on October 15, 1932. (R. .....) The petition for rehearing was filed on October 28, 1932. (R. .....) The order denying the motion to dismiss the appeal based on the Dawes-Simon Treaty of 1932 was entered on January 26, 1933. (R. .....)

3. The Circuit Court of Appeals found no law in force in Illinois covering the offense charged, but nevertheless held that there was such a crime in Illinois. (R. .....) In so holding the court held itself bound by general law-

guage in the opinion in *Kelly* v. *Griffin*, 241 U. S. 6, which, when considered with the issues and facts in that case, is inapplicable. This issue before the Circuit Court of Appeals never has been passed upon by this court, or by any Illinois court, although it involves an important question of local criminal law and affects international extradition.

4. The Circuit Court of Appeals erroneously refused to pass upon the question of whether or not the Dawes-Simon Treaty of 1932 was in force in the United States, which presents a vital question of general law in relation to extradition from the United States to Great Britain, and also erroneously found that the Dawes-Simon Treaty of 1932 carried forward all of the provisions of all prior treaties without any foundation for such finding and in direct conflict with the plain language used, said Dawes-Simon Treaty of 1932 being a complete revision of the policy of the two nations on extradition.

5. Cases which sustain the jurisdiction of this Court to issue the writ are:

Fetters v. *United States*, 283 U. S. 638.
Wong Doo v. *United States*, 265 U. S. 239.

III.

Statement of the case.

A statement of the case has been given under heading "A" in the petition, and for the sake of brevity will not be repeated.

IV.

Specification of errors.

Errors intended to be urged are those specified under heading "B" in the petition, and for the sake of brevity will not be repeated.

ARGUMENT.

I.

An offense to be extraditable, must be (1) "enumerated in the treaties," (2) made criminal by laws of the demanding government, and (3) one for which accused could be held for trial in the state in which he is found.

This principle is recognized by the majority opinion, as well as by the dissenting opinion, of the Judges of the Circuit Court of Appeals in the instant case. It is also clearly stated in *Collins* v. *Loisel*, 259 U. S. 309; *Kelly* v. *Griffin*, 241 U. S. 6; *Wright* v. *Henkel*, 190 U. S. 40; and *United States* v. *Rauscher*, 119 U. S. 407.

II.

The extradition complaint fails to charge an act which is criminal in Illinois. Hence the decision of the Court of Appeals should be reversed regardless of whether this proceeding is governed by the Treaty of 1842 and Convention of 1889, or by the Dawes-Simon Treaty of 1932 and regardless of whether or not this proceeding was abated by the Dawes-Simon Treaty of 1932.

The only act with which your petitioner is charged in the extradition complaint is the "receiving of money knowing the same to have been fraudulently obtained." It is conceded that the offense charged was not a crime under the common law. No statute in force in Illinois has been found covering such an offense.

The Illinois statutes only make criminal the receipt of property knowing the same to have been "stolen" or obtained by "robbery" or "burglary."* Judge Carpenter in his well considered opinion in the District Court held that the charge in this case was not made criminal by any statute or common law of the State of Illinois, and therefore was not an offense upon which extradition could be had from the State of Illinois.

The Circuit Court of Appeals found no law in Illinois making the act charged a crime, but nevertheless held that it was bound by the statement of this court in *Kelly* v. *Griffin*, 241 U. S. 6, 15, that "the receiving of property known to have been fraudulently obtained is a crime by the laws of both Canada and Illinois." The crime charged in the *Kelly* case was not the "receiving of money knowing it to have been fraudulently obtained," but was the receiving of *Government money* by Kelly *from Government officials* knowing that they had obtained it *from the Government* by fraud.† The three sets of statutes (Canadian, Illinois, and Federal) set forth in the brief of the Demanding Government in the *Kelly* case relating to receiving *Govern-*

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* Cahill's Illinois Rev. Stat. 1931, Chapter 38, Par. 507 (Sec. 239):
"Receiving. Every person who, for his own gain, or to prevent the owner from again possessing his property shall buy, receive or aid in concealing *stolen goods* or any thing the *stealing* of which is declared to be larceny, or property *obtained* by *robbery* or *burglary*, knowing the same to have been so obtained, shall be imprisoned. * * *" (Italics ours.)

† The exact language of the pertinent charge in the Kelly complaint, deleted of irrelevant material, was:
"that said Thomas Kelly * * * did also unlawfully receive money, valuable securities or other property *belonging to His Majesty the King* in the right of the Province of Manitoba which had theretofore been * * * fraudulently obtained by means of an unlawful and fraudulent conspiracy entered into between said Thomas Kelly, Sir Rodmond P. Roblin, *then and there Premier* of the Province of Manitoba, Walter H. Montague, *then and there Minister of Public Works*, James H. Howden, *then and there Attorney General*, George R. Coldwell, *then and there acting Minister of Public Works and Minister of Education*, R. M. Simpson, Victor W. Horwood, *then and there Provincial Architect*, * * * to defraud *His Majesty the King* in the right of the Province of Manitoba out of large sums of money * * *." (Italics ours.) (Page 41 of Printed Transcript of Record in the case of *Kelly* v. *Griffin* in the Supreme Court.)

ment money from *Government officials* were claimed by the Demanding Government in the *Kelly* case to make the offense there charged a crime in Illinois. These statutes have no application to the broader and more general offense of receiving *non-government* money from *private* persons or corporations knowing it to have been fraudulently obtained by them.* That these limited (public officer and government fund) features of the crime were recognized by this court in the *Kelly* case is apparent from the statement of the issues in the early part of the opinion and the suggestion in the latter part of the opinion of doubt as to whether Kelly "received the money *of the Government* directly from it, or through a third hand so as to be guilty under this count of the complaint." (Italics ours.)

Judge Carpenter held that the case of *Kelly* v. *Griffin*, 241 U. S. 6, was not intended as a pronouncement that the charge of "receiving property knowing the same to have been fraudulently obtained" was criminal in the State of Illinois, but properly stated that the language used by this Court must be limited to the charge before this Court in that case. In discussing the *Kelly* case, Judge Carpenter said:

> "Mr. Justice Holmes, after disposing of the matter of perjury, states:

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* Main reliance was placed by the Demanding Government in the *Kelly* case on Section 5497, Revised Statutes of the United States: "Every * * * person not an authorized depositary of public funds, who knowingly receives from any * * * agent of the United States any public money * * * otherwise than in payment of a debt against the United States * * * shall be punished * * *"; the Demanding Government's brief also set out in full the following Illinois statutes: Section 167, Ch. 38, Revised Statutes of Illinois [now found in Cahill's Ill. Rev. Stat. 1931, Ch. 38, Par. 380 (Sec. 167)], defining Larceny; Section 74, Ch. 38 [now found in Cahill's Ill. Rev. Stat. 1931, Ch. 38, Par. 186 (Sec. 74)], defining embezzlement; Section 80 of Ch. 38 [now found in Cahill's Ill. Rev. Stat. 1931, Ch. 38, Par. 192 (Sec. 80)], relating to embezzlement and fraudulent taking by public officers; and Section 239 of Chapter 38 [now found in Cahill's Ill. Rev. Stat. 1931, Ch. 38, Par. 507 (Sec. 239)], relating to receivers.

'The last charge, "stealing or embezzling and receiving money fraudulently obtained," needs a word of explanation. It may be assumed that there is no evidence of larceny or embezzlement, as commonly defined, but the receiving of property known to have been fraudulently obtained is a crime by the laws of both Canada and Illinois.'

"That is a very broad statement, *but it is subject to the limitation of the very issues which the Supreme Court had before it.* * * *

"The reliance was placed upon different statutes, and Mr. Justice Holmes, in disposing of the case, when he used the language that 'the receiving of property known to have been fraudulently obtained, is a crime by the laws both of Canada and of Illinois' must have meant, on the facts in that case, money fraudulently obtained from or by a *public official,* and received by some person knowing of that fraud.

"Now, it must be perfectly clear that the Supreme Court of the United States could not, and Mr. Justice Holmes did not intend to hold that it was an offense against the peace and dignity of the State of Illinois, when in fact it was not. * * * I am of the opinion that there is no law in the State of Illinois similar to or substantially the same, making it a crime such as was defined in the jurisdiction of the Demanding Government. * * * Now, I am thoroughly convinced, on an examination and analysis of the *Kelly* case, that Mr. Justice Holmes did not mean what he said in its comprehensive sense." (Italics ours.)

Judge Evans, in his dissenting opinion, in discussing the language in question said:

"Appellee has the right to ask, What is the Illinois statute which makes it an offense against the laws of Illinois to do the acts with which he is charged? For appellants with commendable frankness admit that the offense charged was not a crime at common law. * * * The offense charged against appellee, which apparently is a criminal offense in England, is at most a species of the genus—fraud. It exists, if at all, only because

> a statute makes it a criminal offense. Waiving to one side all rules which necessitate a strict construction of the criminal statutes, the stubborn fact which confronts us is that no Illinois statute has been found which makes it a criminal offense to do the acts charged against appellee. * * * The facts in the *Kelly* case may be distinguished in material respects from the facts in this case."

The majority of the Circuit Court of Appeals did not hold that receiving money knowing the same to have been fraudulently obtained is made criminal by the common law or by any statute of the United States or the State of Illinois. We quote from the majority opinion:

> "Both in the expert evidence and in Judge Carpenter's opinion it is pointed out that the Supreme Court did not indicate any statute of Illinois which declares such acts to be criminal there. But we are concerned with that court's holding, rather than with the route or course whereby the holding was reached."

The majority of the Court entirely failed to deal with the distinguishing features of the charge in the *Kelly* case and in the case at bar, though these distinctions were evident to Judge Carpenter and Judge Evans and were the basis of their opinions. The majority opinion treats the charge in the *Kelly* case as identical with the charge in the instant case, when as a matter of fact the two charges are vastly different.

This Court has repeatedly held that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. This rule has become so well settled that it is referred to as a maxim. A statement in a judicial opinion which is broader than is requisite for the decision of the issue before the court is never to be regarded as controlling in a subsequent case involving a different issue. *Weyerhaeuser* v. *Hoyt*, 219 U. S. 380, 394; *Cohens* v. *Virginia*, 19 U. S. 264, 399; *United States* v.

Wong Kim Ark, 169 U. S. 649, 679; *Weaver* v. *Palmer Bros. Co.*, 270 U. S. 402, 413.

Obviously the issue here cannot be the same as that which was before the Supreme Court in the *Kelly* case, as there is no charge in the present case either that *government money* was taken or that any money was received from a *public official*. Neither the charge in the complaint nor the statutes cited to the Court in the *Kelly* case cover the present offense. The Demanding Government cited in full, the statutes relating to receivers of government funds, which it deemed to be applicable to its case, but which are wholly inapplicable in the instant case. The broad statement of Mr. Justice Holmes cannot be adopted as here controlling without a violation of the above stated maxim which has been observed without exception since it was announced by Chief Justice Marshall in 1821.

The majority of the Circuit Court of Appeals erred in failing to recognize this very material distinction between the charge in the instant case and the charge in the *Kelly* case, and therefore erroneously held that it was bound by the language of the *Kelly* case, even in the absence of any common law or statute in the State of Illinois making the act here charged a crime.

The acts charged in the complaint do not set out a violation of the Illinois Fraudulent Conveyance Act.*

In the *Kelly* case Judge Landis in the District Court held that the offense charged in that case was covered by the Illinois Fraudulent Conveyance Act. This holding was made in conjunction with the charge of knowingly receiving

* Deleting much of the language of the Illinois Fraudulent Conveyance Statute [Cahill's Ill. Rev. Stat. 1931, ch. 38, par. 294 (Sec. 122)] and including only those portions which have strongest intendment against petitioner, the statute would read as follows:

"Every person who shall be a party to a fraudulent conveyance made with intent to deceive and defraud others, or to defeat, hinder or delay creditors or others, of their just debts, damages or demands shall be fined not exceeding $1,000."

government funds from government officials which had been fraudulently obtained by them.

So little reliance was placed upon this statute in the *Kelly* case when it reached this court that no mention was made of it except one statement in parenthesis, in the printed argument of the Demanding Government, commencing "See also."

Judge Carpenter said in his opinion, referring to the Illinois Fraudulent Conveyance Act:

> "That Statute does not make it a crime to receive money knowing it has been fraudulently obtained. There is no charge in the original proceeding before the Commissioner that Factor had been party to a fraud or had made any conveyance with the intent to defraud his creditors. The Fraudulent Conveyance Act on the Illinois Statute books punishes fraudulent conveyance having certain defined results. There is nothing that can be found there to indicate that a man who receives money, knowing it to have been fraudulently obtained, is intended to be included."

Judge Evans, in his dissenting opinion, in referring to the Illinois Fraudulent Conveyance Act, and the Illinois receiving statute said:

> "Obviously it would be impossible to stretch either of these statutes to include one who receives money from another knowing that such other person obtained the money fraudulently. * * * In the instant case the search of counsel, as well as the search of the court, has satisfied me that Illinois has no statute making it a criminal offense to receive property knowing the same to have been fraudulently obtained. The offense charged not being a crime in Illinois, appellants have not brought their case within the terms of the treaty."

The charge against the petitioner is simply that he received money knowing that his transferor had previously obtained it from a third party by fraud. There is no

charge that the transfer to the accused was made with intent or for the purpose of delaying or hindering creditors of the transferor, nor is there any charge that the effect of the transfer was to delay and hinder creditors of the transferor. The essence of the offense under the Fraudulent Conveyance Act is the fraud caused by the transfer of the property, not fraud in the obtaining of it by the transferor. The manner in which the transferor may have previously obtained the property is entirely immaterial. The essence of the offense of receiving property knowing the same to have been fraudulently obtained is the previous obtaining of the property by the transferor by means of fraud and its receipt with knowledge thereof. Summarily stated, the two offenses are entirely different frauds, one an obtaining-fraud, and the other a conveying-fraud. A mere reading of the Illinois Fraudulent Conveyance Act establishes its inapplicability to the charge in the instant case. We submit that said act does not cover the present charge, and that that statute was not considered by this Court in determining the *Kelly* case. That case was decided upon the statutes relied upon and set forth in full in the Demanding Government's brief.

The offense charged against your petitioner is not made criminal by any statute in force in the State of Illinois. The most exhaustive researches were made. In the hearing before the Commissioner both sides were given the opportunity to call expert witnesses on the criminal law of Illinois. Your petitioner called a former Justice of the Illinois Supreme Court, a former Chief Justice and the then Presiding Chief Justice of the Criminal Court of Cook County, Illinois, and two indictment experts of the State's Attorney's Office of Cook County, Illinois, all of whom testified that there was no law which made this offense criminal in Illinois. The Demanding Government offered no witnesses in rebuttal.

The general language in the *Kelly* case under the law was not binding upon the Circuit Court of Appeals, and that Court erred in reversing the decision of the District Court ordering the discharge of your petitioner.

III.

The Court of Appeals erred in holding that the Dawes-Simon Treaty of 1932 did not terminate the proceeding for the extradition of petitioner, and in denying the motion to dismiss the appeal.

Ratifications of the Dawes-Simon Treaty were exchanged by the Governments of the United States and Great Britain on August 4, 1932, and the Treaty was proclaimed by the President on August 9, 1932. The motion to dismiss the appeal based on the adoption of this treaty was denied by the Court of Appeals, not on the ground that the Dawes-Simon treaty was not in effect, but upon the ground that, "assuming though not deciding" that it was in force, it did not affect the extradition proceedings.

The court erred in this holding. The Dawes-Simon treaty not only expressly abrogated the treaty upon which the extradition proceedings against petitioner were based, but removed the offense charged against petitioner from the category of offenses enumerated in the treaty as extraditable, and, upon the assumption made *arguendo* by the Court of Appeals that it was in effect, the extradition proceedings could not be further maintained or prosecuted.

The motion to dismiss the appeal from the order discharging the petitioner, called for a decision as to the status of the 1932 Treaty. The record disclosed every act performed by either government with reference thereto, yet the court not only declined to pass upon the legal effect of these acts, but declared itself unable to do so.

Before passing to the discussion of this error, it seems pertinent to point out that it affects not merely the petitioner, but the governments of the United States and Great Britain. While the doubt, which is explicitly created by the decision of the Court of Appeals, whether the Dawes-Simon treaty or the pre-existing treaties are in force, remains unresolved, *every proceeding for extradition between the United States and Great Britain will be involved in confusion and uncertainty.*

Petitioner regards it as clear that the Dawes-Simon treaty is now in full force and effect as the law of the United States. However, we do not deem it proper upon this petition for certiorari, to argue that proposition, and we confine ourselves to demonstrating that it is a question squarely presented by the record upon which the petitioner was and is entitled to a decision. We submit that the writ of certiorari should issue, not only as a remedy to the petitioner, but to enable this court to resolve the doubt in which the refusal of the Court of Appeals to decide the point has involved the relations of the United States and Great Britain in extradition matters.

The proceedings for petitioner's extradition cannot be maintained or prosecuted under the Dawes-Simon Treaty for the reason that this Treaty not only expressly abrogates Article X of the Ashburton Treaty of 1842 and the Convention of 1889 upon which this proceeding was based, but removes the offense with which petitioner is charged from the category of offenses enumerated as extraditable.

Article 18 of the Dawes-Simon Treaty of 1932 provides, subject to certain exceptions not material to the present case, that "on the coming into force of the present treaty" Article 10 of the Ashburton treaty of 1842 and the Convention of 1889, under which the warrant in the present

case was issued, "shall cease to have effect," and it contains no provision saving any pending proceedings.

Proceedings pending under a treaty which is abrogated, like proceedings under any other law which is repealed, are terminated by the abrogation of the treaty in the absence of a saving clause. *Norris* v. *Crocker,* 54 U. S. 429, 439; *Martin* v. *Hunter's Lessee,* 14 U. S. 304, 370; *Board of Public Utility Commissioners* v. *Compania General de Tobacos de Filipinae,* 249 U. S. 425; *Whitney* v. *Robertson,* 124 U. S. 190; *In Re Peggy,* 5 U. S. 102; *La Republique Francaise* v. *Schultz,* 57 Fed. 32; *Chae Chan Ping* v. *United States,* 130 U. S. 591; *United States* v. *Stafoff,* 260 U. S. 477.

The only reason given by the Court of Appeals for refusing to apply this well settled rule in the case at bar is to be found in its declaration that "the said Dawes-Simon Treaty of 1932 embodies and carried forward all of the provisions of the other named treaties whereunder the extradition proceedings were commenced and carried on." (R. .....)

This statement we deny. The Convention of 1889 which furnished the basis for the proceedings against petitioner, provided for extradition (in the event the offense was criminal in Great Britain and in the state where the accused was found) of an offender charged with receiving money, "knowing the same to have been fraudulently obtained." This is the sole offense charged against the petitioner in this proceeding. The Dawes-Simon Treaty provides for extradition in the case of "receiving any money, valuable security or other property knowing the same to have been *stolen or unlawfully obtained.*" (Italics ours.)

Obviously the phrase "unlawfully obtained" cannot be taken literally. It would be difficult to exhaust the category of methods by which money or other property may be unlawfully obtained, and it will not be seriously contended that the Treaty of 1932 is intended to include the receiving

of money or property obtained through the violation of any of the scores of statutes creating felonies or misdemeanors although the original substantive crimes or misdemeanors are not enumerated as extraditable offenses. The case is patently one for the application of the familiar rule of *ejusdem generis,* and the meaning of the expression "unlawfully obtained" must be regarded as limited by its association with the word "stolen" and restricted to such unlawful obtainings as belong in the category of stealing. *United States* v. *Stever,* 222 U. S. 167; *United States* v. *Salem,* 235 U. S. 237, 249.

This rule was succinctly stated in the case first above cited in which a statutory provision making it criminal to use the mails to promote specifically enumerated schemes having the character of lotteries, concluded its enumeration of the matters included, with the language "schemes devised for the purpose of obtaining money or property under false pretenses." The court held that the statute should be construed to include only such schemes for obtaining money by false pretenses as were similar to lotteries, saying at page 174;

> "In such circumstances, unless there is a clear manifestation to the contrary, general words, not specific or limited, should be construed as applicable to cases or matters of like kind with those described by the particular words."

This rule has been applied in two cases involving proceedings for extradition from Canada to the United States under the Convention of 1889, in which it was held that the words "other property" used in the treaty in conjunction with the words "money or valuable security" could not be construed to include goods and chattels. *In re Cohen,* 8 Ontario Law Reports, 143; *In re Rosen,* 2 Western Weekly Reports, (1931) 779.

Applying the rule thus established it is clear that the expression "unlawfully obtained" in the 1932 treaty cannot be construed as including the obtaining of property by fraud. It is limited by association with the word "stolen" to the class of offenses in which property is unlawfully taken against the will, or without the consent, of the owner or possessor, and has no application to cases in which property is parted with willingly because of fraud.

It follows that the Court of Appeals erred in assuming that the case at bar could be disposed of without passing upon the question whether the treaty of 1932 was in force. That treaty expressly abrogated the treaties under which the warrant against the petitioner was issued. The 1932 Treaty does not enumerate the offense with which petitioner was charged as an extraditable offense and if as we contend it had become effective, there was, at the time of the overruling of the motion to dismiss the appeal, no possible ground upon which the validity of the warrant of commitment could be sustained.

We submit that the questions here presented should be determined by this court. Not only has the lower court misconstrued the Dawes-Simon Treaty in holding that it includes the offense charged against the petitioner, but, by the language in which it couched its refusal to determine whether or not the Dawes-Simon treaty is in force, the Court has created a doubt as to whether that treaty or the pre-existing treaties are in effect. This cannot fail to hamper and embarrass both Governments and all persons who may be concerned in any extradition proceeding between the United States and Great Britain.

CONCLUSION.

There are many offenses considered criminal under the laws of the State of Illinois which are not enumerated in any extradition treaty with Great Britain and not made criminal by the laws of England, and a person committing such an offense in Illinois would not be surrendered to the United States by the authorities of Great Britain.

A complaint under oath charging the commission of an offense which is criminal where the accused is found must be filed before the Commissioner hearing the proceedings can acquire any jurisdiction whatsoever. The complaint against your petitioner has been held by two eminent Federal judges in Illinois not to state an offense made criminal in Illinois. A majority of the Circuit Court of Appeals, on the other hand, although unable to point to any statute or other law in the State of Illinois making criminal the act here charged, did hold that certain language in the case of *Kelly* v. *Griffin*, 241 U. S. 6, bound them to reverse the order of the District Court discharging your petitioner. They were in error in not restricting the language of this Court's opinion in the *Kelly* case to the issue there presented. This Court should, therefore, grant certiorari in order to make definite the meaning of the language used in the *Kelly* case, and to correct the erroneous impression that this Court by judicial pronouncement has sought to make an act criminal in the State of Illinois, although such act is not made criminal by any statute or common law of that State.

This Court should also grant certiorari in this cause for the purpose of judicially determining whether the 1932 Extradition Treaty with Great Britain is now in force in the United States, and if said treaty is in force, its effect upon the present extradition proceedings which were in-

stituted under Article X of the Treaty of 1842 and the Convention of 1889.

All of which is most respectfully submitted.

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